SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 24 1967
JOHN F. DAVIS

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 855

WARREN G. WILLIAMS, JR.
*Petitioner,*

vs.

SEABOARD AIRLINE RAILROAD COMPANY, ET AL.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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WARREN G. WILLIAMS,
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vs.

SEABOARD AIRLINE RAILROAD COMPANY, ET AL.,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of Florida entered in this case on May 24, 1967.

## CITATION TO OPINION BELOW

The opinion of the Florida Supreme Court is reported at 199 So. 2d 469 and it is printed herein as Appendix A.

## JURISDICTION

The decision of the Supreme Court of Florida was entered on May 24, 1967. A timely petition for rehearing was denied on June 28, 1967 (S.R. 21)[1]. Mr. Justice Black granted Petitioner's motion for an extension of time within which to file a Petition for Certiorari to and including November 25, 1967. The jurisdiction of the Court is invoked under 28 U.S.C., Section 1257(3).

## QUESTIONS PRESENTED

I

Whether it is a violation of the Petitioner's right to due process and equal protection of the law as guaranteed by the Federal Constitution for the State Supreme Court to declare unconstitutional a validly enacted, judicially construed comparative negligence statute when such statute is clearly a reasonable exercise of police power of the state in the interest of the public safety.

II

Whether it is a violation of the Petitioner's right to due process and equal protection of law as guaranteed by the Federal Constitution for the State Supreme Court to pass upon a question which was not properly before the Court and so deprive the Petitioner of a vested right.

III

Whether it is a violation of the Petitioner's right to due process and equal protection of law as guaranteed by

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1. References to the record are cited as (R. .....). References to the Supplemental Record are cited as (S.R. .....).

the Federal Constitution for the State Supreme Court to give retrospective application to a recent decision declaring unconstitutional a state statute which had been previously construed to be valid and was in effect at the time the case was tried, the verdict entered and errors on appeal filed.

## CONSTITUTIONAL PROVISIONS INVOLVED

**Amendment XIV: Section 1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTES INVOLVED

Article V, Section 4(2) of the Constitution of the State of Florida and Florida Statute, §768.06 (See Appendix B).

## STATEMENT OF THE CASE

Warren G. Williams, the Petitioner, was seriously injured on July 29, 1963, when the motor vehicle which he was driving was smashed by a Seaboard Airline locomotive at one of the Seaboard Airline Company's railroad crossings in West Palm Beach, Palm Beach County, Florida. At the trial, both Mr. Williams and the Seaboard Airline Railroad requested the charge of comparative negligence under Florida Statute, §768.06 (R. 661, 696). At no time during the

trial did the Defendant railroad challenge the constitutionality or applicability of the comparative negligence statute. The jury returned a verdict in favor of the Petitioner (R. 714).

On October 26, 1964, the Seaboard Airline Railroad (hereinafter Seaboard) filed an appeal with the District Court of Appeal for the Second District. Seaboard raised some ten points in its Assignments of Error (R. 739-40). However, the railroad company still did not raise the constitutionality of the Florida comparative negligence statute. The case was fully briefed in the District Court of Appeals for the Second District. While the case was awaiting oral argument, on May 12, 1965, the Supreme Court of Florida, in *Georgia Southern & Florida Railway Company* v. *Seven-Up Bottling Co. of Southeast Georgia*, 175 So.2d 39 (See Appendix D herein), declared the comparative negligence statute of Florida unconstitutional.[2]

Seaboard, on May 20, 1965, filed a motion with District Court of Appeals for the Second District "To Amend Assignments of Error to Include the Constitutional Question and to File a Supplemental Brief" and a motion that "The Cause Be Remanded to the Trial Court for Retrial" (S.R. 1-4). The motions were briefed and argued, and on July 7, 1965, the Court of Appeals denied both motions. Seaboard took no further action and the case remained in that posture until November 7, 1965, when the case was transferred to the newly created District Court of Appeals for the Fourth District.[3]

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2. ". . . we hold that Section 768.06, *supra*, although perhaps valid when enacted, has now become a discriminatory and burdensome exercise of police power because of changed conditions; . . ." Id. at 42.

3. Article V, Section 5(2), Florida Constitution, as amended November 2, 1965. Ch. 65-294, Florida Statutes (1965), provided for the establishment of a new judicial district.

After arguments on the merits, the Court of Appeals, on July 26, 1966, entered a *per curiam* order affirming the decision of the trial court (S.R. 36). Seaboard's petition for rehearing was denied on September 8, 1966 (S.R. 16). Seaboard then petitioned the Supreme Court of Florida for a Writ of Certiorari. The writ was granted. In his brief the Petitioner pointed out that the issue of the constitutionality of the comparative negligence statute was not properly before the Court and that the application of the *Seven-Up* decision to the instant case would be a denial of his rights as guaranteed by the due process and equal protection clauses of the Federal Constitution. Nonetheless, the Supreme Court of Florida entered a *per curiam* order on May 24, 1967, reversing the Court of Appeals and applied retroactively the decision of the *Seven-Up* case. The Petitioner applied for rehearing and again asserted the violation of his federally protected rights. The Supreme Court of Florida denied his petition for rehearing on June 28, 1967 (S.R. 21).

## REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Florida raises an important and critical question for this Court's determination. Can a state supreme court in derogation of federally protected rights apply a recent constitutional interpretation to an already decided case thus depriving the Petitioner of a judgment in his favor which would compensate him for his injuries? In *Broad River Power Co.* v. *State of South Carolina*, 281 U.S. 537, 540 (1930), Mr. Justice Stone articulated the guiding precepts in this dark corner of the law. "Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of

the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded."

The Supreme Court of Florida erroneously declared unconstitutional the Florida comparative negligence statute and further compounded the error by giving this interpretation retroactive effect. As will be pointed out in the arguments that follow the Supreme Court of Florida in usurping the legislative function has acted in a manner that results in a denial of constitutional rights. *Chicago Life Insurance Co.* v. *Cherry*, 244 U.S. 25 (1917).

In attempting to reach what it has declared to be uniformity and consistency in the administration of justice the Supreme Court of Florida has violated its own rules and the bounds of its own constitutional limitations. Such behavior is manifestly destructive of the basic considerations of fairness and justice which are the heart of due process.

## I

**Whether It Is a Violation of the Petitioner's Right to Due Process and Equal Protection of the Law Guaranteed by the Federal Constitution for the State Supreme Court to Declare Unconstitutional a Validly Enacted, Judicially Construed Statute, When Such Statute Is Clearly a Reasonable Exercise of Police Power in the Interest of the Public.**

In May, 1965, the Supreme Court of Florida in *Georgia Southern and Florida Railway Company* v. *Seven-Up Bottling Company of Southeast Georgia, Inc.*; 175 So.2d 39, determined that the Florida Comparative Negligence Statute was unconstitutional. It is this decision and this action which the Petitioner directly challenges and calls upon this court to consider. The Court in declaring this

statute unconstitutional usurped the function of the legislature and struck down without affording interested parties the opportunity to come forward and present evidence and facts for the court's consideration.[4]

To appreciate fully the situation it must be pointed out that the *Seven-Up* case came to the court on a stipulated agreement of facts and involved only a question of damage to property. The personal injury side of the suit had been settled by the railroad and no real issue remained. Nonetheless, the court took the case and announced a proposition of far-reaching consequence and moment. It should also be pointed out that there was no Petition for a Writ of Certiorari filed with the Supreme Court of the United States.

The comparative negligence statute which was struck down has been on the books since 1887 and had been declared constitutional by the Supreme Court of Florida as recently as 1942 in *Loftin* v. *Crowley's, Inc.*, 8 So.2d 909. It should be noted that this Court denied a Petition for Writ of Certiorari in the case. The statute has since its passage conferred valuable rights in those situations where persons have been injured or killed in accidents involving railroad companies.

Indeed, the Florida Supreme Court in striking down the statute supplanted its will for that of the legislature.

> For reasons stated, we hold that Section 768.06, *supra*, although perhaps valid when enacted, has now become a discriminatory and burdensome exercise of police power because of changed conditions; and that it is,

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4. The Florida Supreme Court denied the petition of Academy of Florida Trial Lawyers, et al. for leave to appear as *amicus curiae* and for extension of time within which to file petition for rehearing and supporting brief.

therefore, invalid under the due process and equal protection clauses of the Federal Constitution and Section 12, Declaration of Rights, Florida Constitution. (Appendix D, p. A12).

Yet the opinion makes no mention of the many injuries and fatalities which still occur as a consequence of railroad accidents. The court did not discuss the many real and valid differences which exist between the railroad companies and other types of common carriers. It is difficult to imagine what radical changes have occurred since 1942 to cause the Supreme Court of Florida to now declare the statute unconstitutional—indeed no reason is given. Certainly the need for the legislation still exists.

Attached hereto as Exhibits D1-D6 are statistics obtained from the Florida Public Service Commission showing the still large number of accidents and type of injuries sustained in railroad accidents. It is hoped that if this petition is granted statistics can be offered to show the number of railroad accidents on a national scale to further highlight the magnitude of the problem.

Traditionally, railroads have been treated in a different manner than other common carriers.[5] Railroads benefited from grants of rights of way and unlike other common carriers own the property over which they travel and are correspondingly liable for its maintenance and repair. To do away with comparative negligence as a doctrine effectively demolishes the chances of recovery by the injured and removes the necessity for care and upkeep of warning devices, crossing signs, and suchlike.

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5. However, it should be noted that admiralty observes a comparative negligence type doctrine. See *Pope & Talbot* v. *Hawn*, 346 U.S. 406 (1953). See also Jones Act, 46 U.S.C. §688 (injury to seaman).

It is well settled that reasonable classification is not violative of equal protection of law. A *legislature* may classify carriers and impose upon one burdens not borne by the others as long as the classification has a reasonable basis. *Morey* v. *Doud*, 354 U.S. 456 (1957). Indeed, almost every state has established some requirement applicable to one segment or class of business with little constitutional interference. See, for example, *Williamson* v. *Lee Optical of Okla.*, 348 U.S. 483, reh. den'd 349 U.S. 925 (1955); *H. P. Welch Co.* v. *State of N. H.*, 306 U.S. 79 (1939). Motor carriers are subjected to different requirements than trains. Yet so long as that classification is reasonable the statute is not unconstitutional.

Even in the face of this compelling judicial development the Supreme Court of Florida in a *stipulated*[6] case chose to declare the state statute unreasonable and violative of equal protection.

Clearly, the action of the Florida court has consequences beyond its borders. Many states have adopted similar statutes and these statutes have been upheld as constitutional.[7] Yet, unless the action of the Supreme Court of Florida is here condemned, it may be the basis,

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6. It is interesting to note that the Plaintiff in that case did not file a petition for certiorari on this important question and when the Academy of Florida Trial Lawyers sought to file as amicus, the State Court denied its request.

7. Statutes making right to recover dependent on comparison of negligence.

Minn. — *Sharp* v. *Johnson*, 80 N.W.2d 650 (1957) (Nebraska Law).

Mich. — *Barnhart* v. *Pere Marquette Railroad Co.*, 155 N.W. 355 (1950).

Calif. — *Mantonya* v. *Bratlie*, 240 P.2d 667 (1952).

Ariz. — *Feffer* v. *Bowman*, 365 P.2d 472 (1961) (Arizona Employers' Liability Act).

the precedent, for actions in other states. Action of this type, which is so far-reaching in its consequences is more properly legislative in nature, the consequence of full hearing and the gathering of evidence from all interested parties.

This Court may appropriately take judicial notice of the fact that the federal government itself has enacted special legislation with regard to railroads and the liability of the employer. Federal Employers' Liability Act, 34 U.S.C., §45; Boiler Inspection Act, 45 U.S.C., §§22 *et seq.*; Safety Appliance Act, 45 U.S.C., §§1 *et seq.* Yet this legislation has not been deemed violative of the equal protection clause of the Federal Constitution.

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*Railroads in Particular*

Mo. — *Tepel* v. *Thompson*, 220 S.W.2d 23 (1949) (Arkansas Law).

S.D. — *Johnson* v. *Chicago & Northwestern Railroad Co.*, 22 N.W.2d 725 (1946).

Wisc. — *Brunner* v. *Minneapolis St. Paul & S.M.R. Co.*, 139 F.Supp. 424, affirmed, 240 F.2d 608 (7th Cir. 1957).

Neb. — *Lewis* v. *Union Pacific Railroad Co.*, 226 N.W. 318 (1929).

Ark. — *Mo. Pacific Railroad Co.* v. *Binkley*, 188 S.W.2d 291 (1945).

Statutes diminishing amount of recovery in proportion to the amount of negligence attributable to plaintiff.

C.Z. — *Panama Railroad Co.* v. *Davies*, 82 F.2d 123 (5th Cir. 1936).

Miss. — *Whitescarver* v. *Miss. Power & Light Co.*, 5 F.Supp. 948, affirmed, 68 F.2d 928 (5th Cir. 1924).

Fla. — *Kirkland* v. *City of Gainesville*, 166 So. 460 (1936).

Ind. — *Louisville, etc.* v. *Wene*, 202 Fed. 887 (7th Cir. 1913).

S.C. — *Templeton* v. *Charleston, etc. Railroad Co.*, 108 S.E. 363 (1921).

Wyo. — *Hines* v. *Sweeney*, 201 Pac. 165 (1921).

Ill. — *Humphreys* v. *East St. Louis & Suburban Railway Co.*, 253 Ill. App. 450.

Ga. — *Southland Butane Gas Co.* v. *Blackwell*, 88 S.E.2d 6, conformed to 88 S.E.2d 424 (1955).

Tenn. — *Swift & Co.* v. *Phelps*, 273 F.2d 551 (6th Cir. 1960).

There can be no doubt that the action of the Supreme Court of Florida is far outside the usual judicial function and is therefore improper. Certainly what the Supreme Court of Florida has done is far beyond determining a question of local law, the action of the court involves the very right to recovery for injury and death which are the unhappy consequence of railroad accidents from which the legislature sought to protect the public. cf. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930).

The legislature in passing the Florida statute fully intended to protect the public from the harm of railroad accidents. In such a situation it has been held to be a proper basis for classification.[8]

## II

**Whether It Is a Violation of the Petitioner's Right to Due Process and Equal Protection of Law As Guaranteed by the Federal Constitution for the State Supreme Court to Pass upon a Question Which Was Not Properly Before the Court and So Deprive the Petitioner of a Vested Right.**

Petitioner Warren G. Williams was struck and seriously injured by a Seaboard Airline locomotive on July 29, 1963. A complaint was filed against the railroad charging specific acts of negligence which resulted in the Petitioner's injury. In effect at the time of the accident and at the time of trial was Florida Statute §768.06 which provided that the victim of the accident could recover damages even when it was shown that the railroad and the victim were both at fault, except that the amount of recovery would be in proportion to the Defendant's negligence. This statute had been passed in the late 1880's

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8. See *Ex Parte Tigner*, 132 S.W.2d 885, aff'd *Tigner* v. *State of Texas*, 310 U.S. 141, *reh. den'd*, 310 U.S. 659 (1940).

and had been judicially construed and upheld in many cases since that time as a valid exercise of police power. The classification with reference to railroads was reasonable and the statute was not essentially arbitrary or unfair.[9]

Both parties to the action prosecuted the lawsuit in accord with the statute and both parties requested instructions in accord with the statute. At no time during the trial did Seaboard attack the constitutionality of the statute. When the jury in accord with the court's instruction and the prevailing statute returned a verdict in favor of the Petitioner the railroad noticed its appeal and filed with the Court of Appeals assignments of error. None of the assignments asserted or even intimated that the comparative negligence statute under which the lawsuit was tried was unconstitutional. However, after the issues were fully briefed and in the hands of the court, the Supreme Court of Florida announced that the comparative negligence statute, though valid when passed, was now invalid. Accordingly, the railroad made motion to the court to take advantage of the change in the law. On July 7, 1965, the Court of Appeals denied the motions and rightfully so.

> It is a rule of long standing that on appeal this Court will confine itself to a review of those questions, and only those questions, which were before the trial court. Matters not presented to the trial court by the pleadings and evidence will not be considered by this Court of Appeal. *Moriani* v. *Schleman*, 94 So.2d 839 (S.Ct. of Florida 1957). See also *Gleason* v. *Dade County*, 174 So.2d 466 (1965).

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9. See, E.g., *Loftin* v. *Crowley's, Inc.*, 8 So.2d 909 (1942). It should be noted that the Supreme Court of the United States denied a petitoin for writ of certiorari, 317 U.S. 661, in this case.

The District Court of Appeals acted in accordance with the law as it had been determined by prior decision. *State* v. *McInnes,* 133 So.2d 581 (1961). Seaboard filed no petition for rehearing to the Court of Appeals, nor certiorari to the Supreme Court of Florida. In November, 1965, the case was transferred to the newly created Court of Appeals for the Fourth District for the determination of the merits of the appeal.

Clearly, the order of the Second District refusing to reopen the case with regard to a matter not raised at trial was a final order.[10] Pursuant to Article V, Section 4(2) the Defendant was obliged to take the matter to the Supreme Court within 60 days as provided by Rule 4.5(c) of Florida Appellate Rules.

The requirement that an application for certiorari filed within 60 days from rendition is jurisdictional and when more than 60 days has elapsed the petition will be dismissed. *Hayes* v. *State,* 151 So.2d 671 (1963), *Flinchbaugh* v. *Florida Real Estate Commission,* 148 So.2d 235 (1963), *Igleheart* v. *City of Miami Beach,* 97 So.2d 487 (1957). This Court is, of course, familiar with the rule in as much as it operates under the same procedure. See Rule 22, Revised Rules of the Supreme Court of the United States.

The record as it was transferred to the Fourth District was complete. The only matters left to be decided were the issues raised by the assignment of errors. The Defendant again tried to raise the constitutional issue by a petition for rehearing. The court, after oral argument,

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10. *Tyler* v. *Huggins,* 175 So.2d 239 (1965). "The finality of the order depends upon the party aggrieved; that is, whether the order appealed from finally determined the particular question as to such party."

on July 26, 1966, affirmed *per curiam* the decision of the trial court.

The action of the Supreme Court of Florida in permitting the Defendant in its petition for writ of certiorari and brief to raise the issue of the constitutionality of the comparative negligence statute was such as to violate the fundamental concepts of due process. See *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). There was no substantial or fair reason to do so. The record on its face contained no error and no conflict with prior or contemporaneous decisions of the Court. *Broad River Power Co.* v. *State of South Carolina*, 281 U.S. 537 (1930). At the time the appellate court issued its order the Petitioner had a vested interest in the verdict; he had acquired a property right which could not be taken from him in a fashion violative of due process. Certainly no legislature could have acted so arbitrarily. *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades Drainage District*, 258 U.S. 338 (1922).

It should be observed that when the Petitioner obtained a *per curiam* affirmance from the Fourth District Court of Appeals it was a final judgment. The Florida statute does not provide for appeal as a matter of right. Review could only be obtained by petition for certiorari in accordance with specific requirements. There was nothing in the record which would support such a writ. Yet the court in derogation of its own rules and the weight of decided cases granted the petition.

As will be developed in the succeeding argument the action of the court in giving retroactive application to the decision in *Seven-Up* also violated the protections afforded by the due process clause of the Federal Constitution.

## III

**Whether It Is a Violation of the Petitioner's Right to Due Process and Equal Protection of Law As Guaranteed by the Federal Constitution for the State Supreme Court to Give Retrospective Application to a Recent Decision Declaring Unconstitutional a State Statute Which Had Been Previously Construed to Be Valid and Was in Effect at the Time the Case Was Tried, the Verdict Entered and Errors on Appeal Filed.**

The Supreme Court of Florida in granting Respondent's writ of certiorari erroneously applied in retrospect to the case at bar, *Georgia Southern and Florida Railway Co.* v. *Seven-Up Bottling Company of Southeast Georgia, Inc.*, 175 So.2d 39 (1965), holding F.S. §768.06 unconstitutional, a decision rendered long after the determination of Petitioner's case in the trial court, and the Respondents' assignment of errors on appeal.

Clearly, the Supreme Court of Florida erred in applying retrospectively a decision invalidating F.S. §768.06. The question of the validity of the statute was never properly raised and did not form part of the record of the lower courts. Even assuming *arguendo* that the question was properly part of the record below, such question was jurisdictionally barred because the necessary petition to the Supreme Court of Florida was not filed within 60 days after the order of the Second District Court of Appeals.

The United States Supreme Court in an unbroken line of cases starting with the *United States* v. *Schooner Peggy*, 5 U.S. 103, 1 Cranch. 103 (1801), to the latest case, *Linkletter* v. *Walker*, 381 U.S. 618 (1965),[11] has recognized the

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11. See particularly 381 U.S. 625, 628. Justice Clark's opinion recognizes a state "may make a choice for itself between the

principle that when a judgment has been finalized, and is not on direct review, any subsequent court decisions should not be given retroactive effect to this particular class of cases. Chief Justice Hughes in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940), commenting on applying retroactively a subsequent ruling by a court invalidating a statute said:

> The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to the invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.

The particular circumstances of the instant case are exigencies which demand examination to afford Petitioner his right to due process and equal protection of the law. The longstanding Florida railroad comparative negligence statute, §768.06 had been deemed valid by the State Supreme Court, *Loftin* v. *Crowley's, Inc., supra,*[12] a factor lending to, if not compelling the parties' unquestioning belief in the constitutionality of the statute. The injustice of applying the *Seven-Up* decision retrospectively is clearly ap-

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principle of forward operation and that of relation back." However, the Court recognizes that it "may *in the interest of justice* make the rule prospective," and that in particular cases, "there is much to be said in favor of such a rule for cases arising in the future."

12. See also *Seaboard A.L.R. Co.* v. *Watson*, 287 U.S. 87 (1932); *Missouri Pacific R. Co.* v. *Ozro Castle*, 224 U.S. 541 (1912); *De Soto Motor Corp.* v. *Stewart*, 62 F.2d 914 (10th Cir. 1933).

parent in the circumstances of the Petitioner's case where a statute has long been in effect, with substantial judicial support for its validity, and where both parties have relied on its application through the course of the original trial and the most substantial part of a long pending appeal. Years of effort and the expense of litigation are wasted.

It is an unreasonable burden, and offensive to the concept of fundamental fairness to require one to bear the effort and expense of litigation for a second time. Even to those who could bear the additional time, effort and expense the second hearing is a penalty. To those less fortunate who cannot bear the additional effort and expense the opportunity for a second hearing results in no hearing at all.[13] Retrospective application creates grave uncertainties and doubts about the administration of justice, and would cause even the most venturesome litigant to question the efficacy of a lawsuit knowing it was subject to unforeseen vicissitudes in the law. Indeed, if retroactive effect were generally applied, the stability of the law, and our fundamental relationships to property and persons premised upon such law would be greatly undermined.

Past decisions have recognized the injustice and unfairness of retrospective application of the law in the area of contract and vested property rights,[14] decisions founded

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13. Where in reliance upon the comparative negligence statute, the Petitioner stipulated to facts prejudicial to recovery on a contributory negligence standard, the retroactive application of a decision invalidating the Florida statute deprived Petitioner of a hearing, in depriving "a person [Petitioner] of all remedy", and where there was not "afforded to him some real opportunity to protect it [i.e. his right to a hearing]" *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930).

14. *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decision*, 60 Harvard L.Rev. 437.

on the rationale of reliance on the then existent law in entering into the contract or property relationship. Even greater reliance is apparent in litigation where argument is founded upon the law then existing, particularly where there has been previous judicial interpretation supporting the statute or provision relied upon.[15]

Under the particular circumstances Petitioner believes justice and fairness would abhor retrospective application of the *Seven-Up* decision, where there was long and rigorous reliance in litigation upon the previous well established and unchallenged railroad comparative negligence statute. The ease of prospective application, the paucity of pending litigation under the comparative negligence statute, the great burden in terms of expense and effort placed upon litigants to retry the case in relation to the insignificant burden on the part of the railroads to complete litigation of these pending cases upon the comparative negligence statute, and the lack of any indication in the *Seven-Up* opinion that the decision should be retroactively applied by the District Court of Appeal are all facts compelling the determination that the Petitioner was denied his right to due process and equal protection of the laws guaranteed by the Fourteenth Amendment.[16]

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15. *Tilly* v. *Flippin*, 237 F.2d 364 (10th Cir. 1956); *De Soto Motor Corp.* v. *Stewart, supra.*

16. Many cases have recognized the injustice of retroactive application. See, for example, *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144 (1944); *Gelpcke* v. *City of Dubuque*, 1 Wall. 175, 68 U.S. 175 (1864); *Molitor* v. *Kaneland Comm. Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); *Harman* v. *Auditor of Public Accounts*, 123 Ill. 122, 13 N.E. 161 (1887); *People ex rel. Att. General* v. *Solomon*, 54 Ill. 39 (1870); *State* v. *Jones*, 44 N.M. 623, 107 P.2d 324 (1940); *Continental Supply Co.* v. *Abell*, 95 Mont. 148, 24 P.2d 133 (1933); *Hare* v. *General Can Purchase Corp.*, 220 Ark. 601, 249 S.W.2d 973 (1952).

## CONCLUSION

For all reasons stated herein Petitioner prays that the Petition for Certiorari be granted.

Respectfully submitted,

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